PLEAS OF "COVENANTS PERFORMED" AND "COVENANTS NOT BROKEN."

Strictly speaking, there is and never was any plea of the general issue in the action of covenant, although the plea of *non est factum* is commonly mentioned as the general issue.[1] That plea makes but a narrow one. It only puts in issue the execution of the deed, or whether or not the deed is void in law, as for lunacy or because it has been fraudulently altered by the opposing party.[2] Nothing can ever be shown by it that makes the deed simply voidable and not absolutely void.[3] All other defences must be made by special pleas.[4]

In practice, the usual pleas in covenant are "covenants performed" and "covenants not broken," and these pleas are usually offered together.[5] Under the practice in some of the circuits in Virginia they are not put in writing and are always offered in open court, and are treated as making sort of a general issue. So common are these pleas that it has grown up to be the mistaken belief of many of the profession that anything can be proven under these pleas, except that the deed has not been executed or that it is void in law.

The plea of "covenants performed" is an affirmative, and "covenants not broken" a negative plea.[6] If the covenant is that the defendant is to do something, the proper plea is "covenants performed;" but if the covenant is that the defendant will *not* do something, th plea is "covenants not broken.[7] When the covenant of the defendant, in the instrument sued on, contains negative as well as affirmative stipulations, the observance of the negative and the performance of the affirmative covenants should be embodied in the same plea.[8]

If the plea is affirmative when it should have been negative, or *vice versa*, it is bad on demurrer.[9] A plea bad on demurrer, however, is cured by verdict; even a plea of "not guilty" in covenant is cured by verdict.[10]

[1] 1 Chit. Pl. 514, 551.
[2] 4 Minor's Inst. 691.
[3] Ib. 691.
[4] 1 Chit. Pl. 515; 5 Rob. Pr. 617-18.
[5] Bart. L. Pr. 505, 502.
[6] Ib. 501-2; 4 Minor's Inst. 1111-12; 5 Rob. Pr. 654; Co. Lit. 303.
[7] Same authorities.
[8] 4 Minor's Inst. 1094, 1111, 1624.
[9] 5 Rob. Pr. 668.
[10] 2 Tucker's Commentaries, 127; 1 Bart. L. Pr. 491, 502; *Smith* v. *Townsend*, 21 W. Va. 486.

Under the plea of "covenants performed" the only issue is, and all that can be proven is, whether or not the defendant *performed his covenants;* and, upon the issue of "covenants not broken," the issue is, and all that can be proven is, whether or not the defendant did do something that he had covenanted not to do.[1] These are the narrow issues made by these pleas, and the proofs are narrowed down to the strict issues made. Under these pleas the defendant admits the instrument sued on. He admits his liability for the performance of his covenants. He admits that the plaintiff has performed any covenants on his part provided for in the instrument sued on. He, in fact, admits everything in the declaration not traversed by the plea. "The effect of the admission is extremely strong, for it concludes the party in that suit so that the jury cannot find against it."[2] These pleas are in confession and avoidance. Under them the defendant admits that he was once liable on the writing sued on, but alleges that he has discharged his liability by the performance, or by the observance, of his covenants.[3] If the suit is for the breach of covenants to pay money to the plaintiff, the plea of "covenants performed" amounts, in substance, to the plea of payment;[4] and the defendant even assumes the burden of proof.[5]

When the defendant pleads "covenants performed" and "covenants not broken," he admits all the facts that are well alleged."[6] The plaintiff, when he sues on an ordinary contract under seal, in which he covenants to do certain things, and in which the defendant also covenants to do certain other things, and *not* to do certain other things, and upon the performance of the covenants by the plaintiff, agrees to pay the plaintiff a certain sum, and the contract is properly declared on, and the defendant pleads "covenants performed" and "covenants not broken," he admits by these pleas that the plaintiff

[1] 1 Bart. L. Pr. 501-502.

[2] 2 Tucker's Commentaries, 256 (marg. p. 263).

[3] 4 Minor's Inst. 701.

[4] *Fenwick* v. *McMurdo*, 2 Munf. 250; 4 Minor's Inst. 701.

[5] "Where issue is joined on a plea of performance, the defendant assumes the burden of proof." 2 Greenl. Ev. 249. "The plea of 'conditions performed' admits all the facts that are well alleged, and assumes the burden of proof." 1 Chit. Pl. 135, note U.

[6] "It is a rule, that every pleading is taken to confess such traversable matter alleged on the other side as it does not traverse." Steph. Pl. 216. "What is alleged and not denied being admitted, it is not necessary for the plaintiff to prove nor perhaps produce the instrument declared on." 5 Rob. Pr. 671; *Riddle* v. *Core*, 21 W. Va.; *Fairfax* v. *Lewis*, 2 Rand. 20; *Zents* v. *Legnard*, 70 Pa. 192. "In Kentucky the plea of 'covenants performed' admits the covenants declared upon, and, if the defendant fails to prove performance, the plaintiff is entitled to a verdict without any evidence." *Barnett* v. *Crutcher*, 3 Bibb. (1 Ky.) 1202; 5 Enc. Pl. and Pr. 382.

has performed his covenants. The only issue, then, is whether or not the plaintiff has been paid the sum provided for in the instrument. The plea has simply the effect of a plea of payment. The plaintiff then in such a case upon principle is entitled to recover without the introduction of any evidence, unless the defendant can establish payment.[1] The reason of this is because the defendant, by his plea, admits the instrument; admits that the plaintiff has done what he was required to do; admits everything not traversed by the plea; admits his liability under the instrument, and it therefore devolves on him to show that he has paid the plaintiff the full amount of the sum mentioned in the instrument; and if he fails in this, judgment must be given for the full amount, or for such sum as it is shown that he failed to pay. It is a rule of pleading of the common law, that if the plaintiff, in response to his adversary's pleadings, fails to deny some of the allegations contained in his adversary's pleading, that he shall be understood to admit the truth of the same, and this rule has in no way been altered by statute. "This rule is an inevitable consequence of the rule that requires singleness of issue. It is manifest that the rule requiring singleness of issue, and, therefore, singleness of averment, would be vain, if the pleader were not understood to admit such of his adversary's averments as he does not deny.[2] However, on principle, while this is true under these pleas, it is nevertheless necessary, perhaps, for the plaintiff to first introduce the instrument sued on, and to simply show the amount that he claims to be due him, and the time that interest first accrues, for the reason that our statute provides that judgment shall be for the principal sum due, with interest thereon, from the time it became payable, and the inspection of the instrument must be made to correctly arrive at this.[3]

In an action of covenant, in the circuit court of Augusta county, at the November term, 1899, the defendant pleaded "covenants performed" and "covenants not broken," and, at the trial, the plaintiff introduced the contract sued on, and simply showed the amount that he claimed, after allowing certain credits, and when interest accrued, and then rested. The defendant then attempted to show that he had not observed and performed his covenants, because the plaintiff had not observed and performed his; but the plaintiff objected upon the grounds that that could not be shown under the defendant's plea, and the

[1] *Hubbard* v. *Blow*, 4 Call, 224; 4 Minor's Inst. 702.

[2] 4 Minor's Inst. 664-5, 1018.

[3] *Moore* v. *Fenwick*, Gilm. 220: 4 Minor's Inst. 703-4; Va. Code, 3287.

court sustained the objection, and held that the defendant under his plea was confined to evidence going only to show that he had observed and performed his covenants; that the defendant by his plea admitted that the plaintiff had observed and kept his covenants, and that the defendant's plea had, therefore, only the effect of a plea of payment.[1] The defendant could not prove payment, and the jury found a verdict for the plaintiff for the amount claimed.[2]

Counsel for the defendant were very much surprised at the ruling of the court, as were many of the bar, and a motion was promptly made to set aside the verdict. The motion was fully argued and maturely considered, but it was overruled by the court, and judgment was entered upon the verdict.

The learned judge of the circuit court was clearly right in his decision. If the plaintiff had not fulfilled his covenants, that could not be shown under the defendant's plea, for that would have been foreign to the issue made, and was the subject of another plea; and, for the same reason, the defendant could not show that he had not observed and performed his covenants because the plaintiff had not observed and performed his.[3] In covenant, every defence relied on, other than *non est factum*, must be made by special plea.[4]

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[1] "The plea was 'covenants performed,' and amounts, in substance, to the plea of payment. Under this plea no matter of defense could be introduced by the defendant, but such as tended to support their plea. They could not avail themselves of a precedent covenant to be performed by the plaintiff, and could not have held him to prove performance on his part of such precedent covenants. All the plaintiff was bound to prove, was the amount of the sums expended, and that proper vouchers were produced." *Fenwick* v. *McMurdo*, 2 Munf. 250.

[2] The verdict was for a less sum than $500.

[3] "This plea can only be supported by evidence which shows that the defendant has performed his covenants, and not by evidence showing that his own performance was excused by the act of the plaintiff or any other." 1 Bart. L. Pr. 501. "If the defendant has a lawful excuse of non-performance, it should be specially pleaded, and its nature specially shown." 5 Rob. Pr. 617-18; *Scraggs* v. *Hill*, 17 S. E. Rep. 185 (37 W. Va. 709).

[4] 1 Chit. Pl. 515-16; 1 Bart. L. Pr. 502.